Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

ERIC WAYNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX

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27pgs

No. CR 88-17

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ERIC ALAN WAYNE,
Defendant.

Filed April 30, 2001

This matter came before the Court and

IT IS ORDERED AND ADJUDGED THAT

Plaintiff, Eric Wayne, take nothing on his first four claims and a certificate of appealability as to these claims is therefore denied.

IT IS FURTHER ORDERED AND ADJUDGED THAT

Plaintiff take nothing on his portion of § 2255 motion, as amended, asserting an Apprendi violation and a certificate of appealability as to this claim is granted.

DATED: April 30, 2001

James D. Hodges, Jr.
Clerk
(By) Deputy Clerk

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This matter comes before the court pursuant to the September 12, 2000, Report and Recommendation filed by Magistrate Judge Paul A. Zoss on defendant Eric Alan Wayne's amended motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence on two drug-trafficking offenses. Both parties have filed objections to the Report and Recommendation, necessitating de novo review of at least some of the issues presented. The critical issue in this matter is the impact upon convictions for drug offenses more than a decade ago of the Supreme Court's recent

decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), which now requires that drug quantity be alleged in an indictment and submitted to a jury for determination beyond a reasonable doubt.

I. INTRODUCTION

A. Trial and Sentencing

Defendant Eric Alan Wayne came to trial on October 4, 1988, on a superseding indictment charging him with five drug-trafficking offenses. Although the indictment alleged that the offenses charged involved various approximate quantities of controlled substances, in accordance with circuit precedent at the time, the jury was not asked to determine quantity beyond a reasonable doubt. Instead, the jury was instructed that it need only determine whether a measurable amount of a controlled substance was involved in each offense charged. On October 12, 1988, the jury convicted Wayne on Counts I, II, III, and V of the indictment, but acquitted him on Count IV.

On March 3, 1989, the trial court granted Wayne's motion for a new trial on Counts I and II, on the ground that the government had withheld certain evidence, but sentenced Wayne on Counts III and V. On Count III, which charged. Wayne with possession of approximately three kilograms of cocaine with intent to distribute it and aiding and abetting possession with intent to distribute, the trial court imposed a pre-Guidelines sentence of forty years. On Count V, which charged Wayne with conspiracy to distribute and to possess with intent to distribute marijuana and more than five kilograms of cocaine, the trial court imposed a sentence of 300 months imprisonment pursuant to the Sentencing Guidelines. Each sentence was enhanced above the twenty-year maximum sentence authorized for indeterminate quantities of controlled substances by 21 U.S.C. § 841(b)(1)(C), based on quantities of cocaine in excess of 500 grams, pursuant to 21 U.S.C. § 841(b)(1)(B)(ii)(II),

B. Wayne's § 2255 Motion

Wayne filed his present collateral attacks on his sentences on Counts III and V pursuant to 28 U.S.C. § 2255 on April 21, 1997. Wayne's § 2255 motion, as amended on March 27, 2000, raises five issues: (1) that the convictions were obtained in violation of Brady v. Maryland, 373 U.S. 83 (1963), as reinterpreted in Kyles v. Whitley, 514 U.S. 419 (1995); (2) that trial counsel was ineffective in numerous respects; (3) that appellate counsel was ineffective in several respects; (4) that trial counsel was ineffective in failing to raise certain sentencing issues; and (5) that the district court cried in not submitting the threshold statutory drug amounts for enhanced sentencing to the jury and in not requiring the government to prove the amounts involved beyond a reasonable doubt, a so-called "Apprendi violation," after Apprendi v. New Jersey, 530 U.S. 466 (2000).

In a Report and Recommendation filed September 12, 2000, Judge Zoss recommended that relief be denied on the first four claims asserted, but recommended that Wayne be granted relief on his Apprendi claim. Specifically, Judge Zoss recommended that Wayne's sentences on Counts III and V be vacated and that Wayne be resentenced to twenty years imprisonment on Count III and 240 months imprisonment on Count V, with the sentences to run concurrently.

Wayne filed objections to portions of Judge Zoss's Report and Recommendation on September 22, 2000. As to his first four claims, Wayne relied on his prior briefing of the issues and submitted only the general contention "that errors of fact and law were made by the Magistrate Judge and that that Court erred when relief was not given on each of the aforementioned relief bases. " Mr. Wayne's Objections To Certain Portions Of Magistrate Judge Zoss' Report and Recommendation (Wayne's Objections) at 1. As to Judge Zoss's recommended disposition of his Apprendi claim, Wayne objected as follows:

> The Magistrate Judge engaged in a complete analysis with regard to the Apprendi/elements of the crime issue. Mr. Wayne agrees with the conclusion reached by the Magistrate Judge that Apprendi mandates relief for Mr. Wayne. However, he would submit that an appropriate sentence under section c [of 21 U.S.C. § 841(b)(1)] must be arrived at after a sentencing hearing by this Court Mr. Wayne objects to the conclusion of the Magistrate Judge that he must be sentenced to the highest possible sentence under section c as there is no minimum sentence mandated by that section,

Id. Thus, as to the Apprendi claim, Wayne objects only to the relief recommended.

The government also filed objections to Judge Zoss's recommended disposition of the case on September 22, 2000, specifically objecting to various details in Judge Zoss's recitation of the facts and procedural history of the case and asserting certain additional information should have been included. Of more moment are the government's contentions that Judge Zoss erred in concluding that the Apprendi decision applies retroactively to eases on collateral review and by rejecting the government's argument that any error in failing to present the drug quantity issue to the jury in this case was harmless given the strength of the evidence presented at trial and the prior findings by the district and appellate courts regarding the strength of that evidence. The government also asserted that Judge Zoss had improperly ignored the government's contention that Wayne's present petition is a "second or successive motion," filed without the certification of the Eighth Circuit Court of Appeals required by 28 U.S.C. § 2244. Wayne filed a reply to the government's objections on October 4, 2000.

By letter to counsel dated October 31, 2000, the undersigned advised the parties that the court intended to take a 'wait and

see" approach to Judge Zoss's Report and Recommendation, at least for a reasonable time, in light of the rapid pace with which the federal Circuit Courts of Appeals were addressing Apprendi issues on direct appeals and collateral reviews, hoping for some guidance from the Eighth Circuit Court of Appeals on the "retroactivity" of Apprendi to cases on collateral review. The court further requested status reports from the parties, for example, every thirty days, concerning decisions addressing the retroactive application of Apprendi.

In response to the court's letter, Wayne filed a status report on December 29, 2000, and the government filed a status report on February 12, 2001. Wayne's status report cited no controlling authority that would be dispositive of his § 2255 motion. However, the government suggested that Wayne's § 2255 motion could be resolved on two grounds, on the basis of recent, controlling authority from the Eighth Circuit Court of Appeals. The first such ground was "harmless error," pursuant to the decision of the Eighth Circuit Court of Appeals in United States v. Anderson, 236 F.3d 427 (8th Cir. 2001). The second ground was failure to show "prejudice" to sustain the "Apprendi claim," pursuant to United States v. Sturgis, 238 F.3d 956 (8th Cir. 2001), because Wayne's longer sentence, forty years on Count III, did not exceed the maximum possible sentences for indeterminate quantities of cocaine on Counts III and V, twenty years each, if served consecutively.

In an order dated March 6, 2001, the court recognized that either of the arguments raised in the government's February 12, 2001, status report was potentially dispositive of Wayne's motion, without consideration of the "retroactivity' issue concerning the applicability of Apprendi to Wayne's action for collateral review. Therefore, the court directed the parties to tile supplemental briefs concerning the grounds for disposition of this matter raised in the government's February 12, 2001, status report, on or before

March 20, 2001, and reply briefs on or before March 25, 2001. The court also directed the parties to bring to the court's

attention any controlling authority that was handed down in the interim concerning the propriety of "retroactive" application of the Apprendi decision to the present case. On March 15, 2001, upon the oral request of Wayne's counsel, the court entered a written order extending the parties' briefing deadlines to March 27 2001, for supplemental briefs and to April 2, 2001, for any reply briefs.

The government filed its supplemental brief on March 20, 2001, and Wayne filed his on March 27, 2001. On March 28, 2001, the government moved to strike Wayne's supplemental brief as untimely, apparently because the government bad never received a copy of the court's order of March 15, 2001, extending the briefing deadlines. On March 29, 2001, the court denied the government's motion to strike Wayne's supplemental brief, but granted the government's alternative motion for a further extension of time to file a reply brief. Consequently, the court granted the parties an extension, to and including April 6, 2001, to file any reply to the opposing party's supplemental brief. The government filed a reply to Wayne's supplemental brief on April 6, 2001, but Wayne did not submit any further timely briefing.

On April 24, 2001, however, well after the deadline for reply briefs, Wayne submitted a "Request For This Court To Accept His Reply To The Government's Response," and the "Reply" itself, asserting that Wayne's counsel had not received a copy of the government's supplemental brief until after it had been "lost in the mails for over one week and counsel had to obtain a copy from Chambers." Wayne gives no explanation for his failure to request a copy of the government's brief at or shortly after the deadline for the filing of supplemental briefs and no explanation for failing to move for an extension of time to file a reply brief until well after the deadline for such replies had long passed. The court does not condone such dilatory conduct. Nevertheless, the court's review of Wayne's very belated reply brief indicates that it advances no new arguments and identifies no new evidence, such that the government will not be prejudiced if the court considers the untimely reply. Therefore, the court will, albeit reluctantly,

consider Wayne's belated reply brief, and this matter is now fully submitted.

II. LEGAL ANALYSIS

A. Standard Of Review For A Report And Recommendation

The standard of review to be applied by the district court to a report and recommendation of a magistrate judge is established by statute:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations by the magistrate [judge] may also receive further evidence or recommit the matter to the magistrate [judge] with instructions.

28 U-SC. § 636(b)(1). The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a de novo review of a magistrate judge's report where such review is required. See, e.g. Hosna v. Groose, 80 F.3d 293, 306(8th Cir.) (citing 28 U.S.C. § 636(b)(l)), cert. denied, 519 U.S. 860(1996); Grinder v. Gammon, 73 F.3d 793, 795 (8th Cir. 1996) (citing Belk v. Purkett, 15 F.3d 803, 815 (8th Cir. 1994)); Hudson v. Gammon, 46 F.3d 785, 786(8th Cir. 1995) (also citing Belk). Because objections have been filed in this case, the court must conduct a de nova review.

However, the plain language of the statute governing review provides only for de novo review of "those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). The court finds that Wayne's "objections" to Judge Zoss's recommended disposition of his first four claims do not meet the requisite

specificity to invoke de nova review. A general objection "that errors of fact and law were made," see Wayne's Objections at 1, does not constitute an objection to "those portions of the report or specified proposed findings or recommendations." See 28 U.S.C. § 636(b)(1) (emphasis added). Nor does Wayne's reference to his prior briefing of these four claims somehow provide the requisite specificity, because prior argument cannot constitute objection to any portion of a later report, finding of fact, or recommendation. Thus, the court concludes that Wayne has not raised objections requiring de nova review of the recommended disposition of his first four claims. Therefore, the recommendation concerning those claims will be reviewed only for clear error.

On the other hand, Wayne's objection to Judge Zoss's recommendations concerning his resentencing does meet the requisite specificity to invoke de novo review, if the court uphold's Judge Zoss's recommendation that Wayne's sentences must be vacated pursuant to Apprendi. Similarly, the government's specific objections to Judge Zoss's recommendations concerning Wayne's Apprendi claim certainly do require de novo review. Therefore, the court concludes that it must make a de nova review only of the Apprendi claim on which Judge Zoss recommended that relief be granted. See id. (de novo review is required only of "those portions of the report or specified proposed findings or recommendations to which objection is made") (emphasis added).

B. Harmless Error

Upon de novo review of Judge Zoss's Report and Recommendation concerning Wayne's Apprendi claim, and upon consideration of the parties' supplemental briefing and replies, however belated, the court concludes that the government's assertion of "harmless error" is dispositive of Wayne's Apprendi claim. This is so, even if Wayne's Apprendi claim is otherwise on the proper procedural footing-that is, not part of an unauthorized "second or successive" petition,

see 28 U.S.C. § 2244-and even assuming further that Apprendi is retroactively applicable to cases on collateral review. But see United States v. Sanders, __F.3d __, __, 2001 WL 369719, *1(4th Cir. April 13, 2001) ("[B]ecause the new rule of criminal procedure announced in Apprendi v. New Jersey, 530 U.S. 466 (2000), does not apply retroactively on collateral review, we affirm the district court's dismissal of Sanders' habeas petition [pursuant to § 2255]."). The government's assertion of "harmless error" is premised on United States v. Anderson, 236 F.3d 427 (8th Cir. 2001), a per curiam decision addressing a defendant's direct appeal of his sentence, following conviction by a jury, on a charge of conspiring to manufacture methamphetamine. The court's de nova review of the Apprendi issue therefore begins with consideration of the Anderson decision and the applicability of "harmless error" review to Apprendi claims raised in actions for collateral review of convictions or sentences.

1. The Anderson decision

In Anderson, the Eighth Circuit Court of Appeals found that the district court had "contravened the rule of Apprendi" by finding that the conspiracy with which the defendant was charged involved fifty or more grams of methamphetamine and imposing a sentence of thirty years. when the jury found only that the defendant conspired to produce a "measurable amount" of methamphetamine, rather than a specific drug quantity. Anderson, 236 F.3d at 429. However, the reviewing court concluded that "[t]his determination does not end our inquiry, because Apprendi "did not recognize or create a structural error that would require per se reversal." Id. (quoting United Stales v. Nealy, 232 F.3d 825, 829 (11th Cir. 2000)). Therefore, the court's inquiry continued as follows:

> We have held that in light of Apprendi, "[D]rug quantity must often be treated as an element of the offense under § 841." United States v. Sheppard, 219 F.3d 766, 767 (8th Cir. 2000). Certainly this is such a case. However, the Supreme Court has held that if a trial court

> errs by omitting an element of the offense from its charge to the jury, instead deciding the element itself, the conviction must still be affirmed if the error was harmless. Neder v. United States. 527 U.S. 1, 8-15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Accordingly, we must affirm the appellants' sentences unless we find that "the record contains evidence that could rationally lead to a contrary finding with respect to the omitted evidence." Id. at 19, 119 S. Ct, 1827.
>
> In this case, there was overwhelming evidence that appellants conspired to produce amphetamine in a quantity sufficient such that appellants' thirty-year sentences do not exceed the statutory maximum as proscribed by Apprendi.

Anderson, 236 F.3d at 429 (footnote omitted).[1] After reviewing the evidence of drug quantity that the court had described as "overwhelming," the court concluded, "Because no rational jury could have found appellants guilty of the substantive offense, yet at the same time found that the amount of methamphetamine the conspiracy sought to produce was less than five grams [the threshold for enhanced sentencing], we hold the Apprendi error to be harmless beyond a reasonable doubt." Id. at 430 (citing Nealy, 232 F.3d at 830).[2] Thus, Anderson expressly authorizes application of a "harmless error" standard to the lack of jury determination of drug quantity.

2. Wayne's opposition to "harmless error" review

Wayne, however, contends that the applicable decision of the Eighth Circuit Court of Appeals is not Anderson, but an unpublished decision in United States v. Crank, 2001 U.S. App. LEXIS 3439 (8th Cir, March 6, 2001), a copy of which is attached to his supplemental brief. Wayne contends that, in Crank, the Eighth Circuit Court of Appeals vacated a

sentence of 245 months, which exceeded the sentence for an indeterminate amount of cocaine base, on the ground that "the quantity was approximated in the charging document but the jury was forbidden to deliberate on the quantity element." Mr. Wayne's Further Briefing (Defendant's Supplemental Brief) at 11. He contends that his situation is analogous, because drug quantity was only approximated in the indictment against him and the jury instructions forbade the jury from determining quantity, instead permitting the jury to determine only whether a measurable amount of a drug was involved in each offense. Thus, Wayne's contention appears to be that his sentence must be vacated pursuant to Crank, not reviewed for "harmless error" pursuant to Anderson.

However, Wayne has mischaracterized Crank. In Crank, the court actually stated the following:

> Turning to Crank's sentence, we conclude the district court's decision to hold Crank accountable for 1.4 kilograms of cocaine base for sentencing purposes, after cautiously taking into consideration one of the witness's tendency to exaggerate, was not clearly erroneous. See United States v. Padilla-Pena, 129 F.3d 457, 467 (8th Cir. 1997) (reviewing court is particularly hesitant to find clear error in district court's drug quantity findings where those findings are based on determinations of witness credibility), cert. denied, 524 U.S. 905, 906(1998). Nevertheless, we must vacate the 245-month prison terms imposed on the conspiracy and cocaine-base distribution convictions and remand for reconsideration in light of recent Supreme Court directives. See Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435(2000) (other than fact of prior conviction, any fact that increases penalty beyond prescribed statutory maximum must be submitted to the jury and proved beyond reasonable doubt).

> Where, as here, the quantity of drugs was not alleged in the indictment or submitted to the jury, Crank could not be sentenced above the twenty-year statutory maximum prison term he faced, without reference to drug quantity, for his involvement in these schedule II controlled substances. See 21 U.S.C. 841(b)(1)(C) (authorizing maximum twenty-year prison term for first-time felony schedule II controlled substance offenders, and minimum three-year supervised release term); United States v. Nicholson, 231 F. 3d 445 452 55 (8th Cir. 2000), petition for cert. filed, (Jan. 29, 2001) (No. 00-8376).

Crank, 2001 U.S. App. LEXIS 3439 at *3-*4 (emphasis added). Nowhere does the decision in Crank suggest, as Wayne argues, that "the quantity was approximated in the charging document; rather, the decision expressly states that "the quantity of drugs was not alleged in the indictment." Id. at *3 (emphasis added). Thus, even assuming that Crank stands for the proposition that the court must vacate a sentence when drug quantity is neither charged in the indictment nor submitted to jury determination, Crank is clearly distinguishable from the present case, in which drug quantity was stated in each charge of the indictment. In such circumstances, Anderson requires the court to review whether failure to submit the determination of drug quantity to the jury was harmless beyond a reasonable doubt. See Anderson, 236 F.3d at 429.

Nor does Wayne's argument that quantity was only approximated in the indictment in his ease require the court to forego "harmless error review and simply vacate his sentence. in United States v. Swatzie, 228 F.3d 1278 (11th Cir. 2000), the indictment charging the defendant with possession of cocaine base with intent to distribute it did not state any quantity. Swatzie, 228 F.3d at 1280. After determining that the evidence was such that "a jury could not . . . have concluded that Swatzie possessed a controlled substance with intent to

distribute, but did not possess at least 5 gm of cocaine base," the sentencing enhancement threshold for cocaine base, the court also observed, "Swatzie [has not] hinted that, for lack of notice from the indictment, he had difficulty disputing the issues of either the kind of drugs or the quantity. Reversing the judgment in these circumstances would thus itself 'bestir the public to ridicule' the judicial process." Id. at 1284 (quoting Johnson v. United States, 520 U.S. 461., 470 (1997), in turn quoting R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 50(1970)). For these reasons, the court in Swatzie declined to notice any plain error. Id.

In Wayne's case, Count III of the indictment charged that Wayne "did knowingly and intentionally possess with intent to distribute and aid and abet the possession with intent to distribute. approximately three kilograms of cocaine," see Trial Transcript, Vol. I, 113 (emphasis added), and Count V of the indictment charged Wayne with conspiracy to distribute and possess with intent to distribute, marijuana . . . and more than five kilograms of cocaine " See id. at 114 (emphasis added). Although Wayne contends that the indictment only charges quantities "approximately," he does not explain how the language of the indictment, which clearly identified the controlled substances at issue and clearly established that quantities in excess of the threshold amounts for enhanced sentencing were at issue, "for lack of notice. . . [gave him] difficulty disputing the issues of either the kind of drugs or the quantity." Swatzie. 228 F.3d at 1284.

Moreover, this court can find no decision holding that Apprendi requires that an indictment state exact amounts of controlled substances, rather than approximations. Indeed, in Apprendi, the Supreme Court embraced the proposition stated in Jones v. United States, 526 U.S. 227 (1999), that, "'under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.'" Apprendi, 530 U.S. at 476 (quoting Jones,

526 U.S. at 243 n. 6). Under 28 U.S.C. § 841(b), facts that "increas[e] the maximum penalty for a [drug] crime" include the quantity of drugs stated in approximate terms of so many grams or kilograms "or more of the specified substance. See 28 U.S.C. § 841(b)(1)(A)-(C). Thus, any indictment language that specifies an approximate quantity in excess of a statutory "breakpoint" in § 841(b), such as "500 grams or more of a mixture or substance containing a detectable amount of. . . cocaine," see 28 U.S.C. § 841(b)(1)(B)(ii)(II), satisfies the requirements of Apprendi. Counts III and V of the indictment in question here undoubtedly met this requirement, where they alleged "approximately three kilograms of cocaine" and "marijuana . . . and more than five kilograms of cocaine. . . .", respectively, thus alleging quantities that satisfy the Apprendi/Jones requirement to allege "500 grams or more" of cocaine to give notice of the applicable enhancement of the maximum penalty.[3]

Similarly unavailing is Wayne's assertion that another unpublished decision, United States v. Maglothin, 2001 WL 121992, 2001 U.S. App. LEXIS 2095 (8th Cir. 2001), "speaks to the erroneous logic of reading an 'amount' into a conviction to circumvent Apprendi." Defendant's Supplemental Brief at 13. The court cannot fathom how the Maglothin decision speaks to any such proposition. Rather, the court in Maglothin specifically stated that it was applying "plain error" review to Maglothin's Apprendi challenge and concluded that "Maglothin's 168-month prison sentence doesn't violate due process because the statutory maximum sentence for an indeterminate quantity of meth[amphetamine] is 240 months." Maglothin, 2001 WL 121992 at *1. Thus, if anything, the Maglothin decision supports the application of "plain error" or "harmless error" review to failure to submit the issue of drug quantity to the jury.

3. The nature of "harmless error" review

Finding that "harmless error" review is appropriate pursuant to Anderson, the court is also unpersuaded by Wayne's contention that the key issue in this case is that the jury was

never permitted to consider drug quantity, and indeed, was specifically instructed not to consider drug quantity. Wayne contends that, to accept the government's arguments, the court would have to conclude that the jury ignored such instructions and made a drug quantity determination matching the amounts charged in the indictment. This argument simply misses the point: It is clear that, if Apprendi is retroactively applicable to cases on collateral review, Apprendi would have required submission of the drug quantity issues to the jury, and that Failure to do so constituted an "Apprendi error." See Anderson, 236 F.3d at 429. However, where 'harmless error' review is appropriate, that conclusion does not end the inquiry. Id. Rather, the question is not whether the jury ignored instructions, or whether some drug quantity "finding" is implicit in the jury's determination of guilt on a particular offense, but whether, in light of the evidence presented, "no rational jury could have found (the defendant) guilty of the substantive offense, yet at the same time [have] found that the amount of [controlled substances] was less than (the threshold for enhanced sentencing]." Anderson 236 F.3d at 430. To put it another way, on review for "harmless error," the question is whether there was overwhelming evidence of drug quantity on Counts III and V such that Wayne's sentences do not exceed the statutory maximums as proscribed by Apprendi. Anderson, 236 F.3d at 429.

Thus, the court must also reject Judge Zoss's conclusion that "the Government's argument that the error was harmless [is] disingenuous, where a resentencing would reduce the length of Wayne's imprisonment." Report and Recommendation at 39. The question on "harmless error" review is not whether resentencing based on indeterminate quantities would have resulted in a shorter sentence—indeed, the fact that sentencing on indeterminate quantities would result in a shorter sentence merely begs the question of whether the error in taking from the jury the question of drug quantity was "harmless." The proper question is whether failure to submit the question of drug quantity to the jury was "harmless," because no rational jury could have found a drug

quantity less than the amount required to impose an enhanced sentence. See Anderson, 236 F.3d at 429-30.

4. Evidence of drug quantity

In Anderson, the evidence that the court found established drug quantity so "overwhelmingly" that any Apprendi violation in failing to submit the drug quantity question to the jury was 'harmless" consisted of the following:

> It is undisputed that law enforcement officers seized approximately 100 grams of pseudoephedrine, the main precursor chemical far making methamphetamine, from the residence of appellants' coconspirator. The prosecution introduced expert testimony that this quantity of pseudoephedrine could theoretically yield about ninety-two grams of methamphetamine. Appellants' own expert concurred with this yield estimate. To be sure, the relevant inquiry is not what a theoretical maximum yield would be or even what an avenge methamphetamine cook would produce, but what appellants themselves could produce. United States v. Cole, 125 F.3d 654, 655 (8th Cir. 1997). However, appellants' co-conspirator was an experienced cook, the defense expert conceded that the conspirators' recipe was viable, if crude, and a search by authorities revealed traces of methamphetamine on laboratory equipment.

Anderson, 236 F.3d at 429-30 (footnotes omitted). Wayne argues that, in Anderson, the parties' experts agreed on the quantity of methamphetamine at issue, hut in his case. There was no such agreement of experts. Nevertheless, the court finds that the evidence of drug quantity on Counts III and V against Wayne was equally "overwhelming."

The government contends, and the court finds, that the evidence of drug quantity on Counts III and V of the indictment against Wayne was undisputed at trial. As the government points out, witness Newland's evidence on the possession-with-intent charge in Count III was that Wayne possessed three kilograms of cocaine with intent to distribute it to Newland and that Newland in fact purchased three kilograms of cocaine from Wayne. See Trial Transcript, Vol. IV, at 753-54. Although Wayne's trial counsel cross-examined Newland extensively over the arrangements to drive the cocaine to Iowa, where the person Newland identified as the driver did not have a driver's license or credit card, nowhere in that cross-examination did counsel attempt to cast any doubt on Newland's testimony that the transaction involved three kilograms of cocaine. See id. at 838-41. Again, in closing arguments—which are not evidence in any event—trial counsel impugned the credibility of Newland's testimony about arrangements to transport the cocaine back to Iowa, but never contested that the transaction involved three kilograms of cocaine. Id., Vol. V, at 971-75. Although Wayne may have challenged the "credibility" and "viability" of the prosecution, he never challenged the quantity of drugs upon which Count III was based. See United States v. Terry. 240 F.3d 65, 74 (1st Cir. 2001) (the defendant's defense of entrapment did not challenge the evidence of drug quantity, so that the error in failing to submit drug quantity to jury determination was harmless); (United States v. Nealy, 232 F.3d 825, 829-30 (11th Cir. 2000) (any Apprendi error based on drug quantity was harmless, where the defendant did not contest the quantity of drugs at trial): Surratt v. United States, __ F. Supp. 2d __, 2001 WL 391858, *2 (D. Minn. March 30. 2001) (holding on a § 2255 motion, that an alleged Apprendi error was "harmless," in light of "undisputed evidence of drug quantity at trial"); Robinson v. United States, 129 F. Supp. 2d 627, 631 (S.D.N.Y. 2001) (on a § 2255 motion, an Apprendi error was "harmless," even in light of evidence that another person testified that the drugs were his, because '[t]here was no challenge to the drug quantity, either at trial or at sentencing [so that] [m]ovant effectively conceded the amount"); Levan v. United States, 128 F. Supp. 2d 270, 278-79

(ED. Pa. 2001) (reasoning that an Apprendi error was "harmless," where drug quantity evidence was presented to the jury at trial without dispute); United States v. Gibbs, 125 F. Supp. 2d 700, 706 (E.D. Pa. 2000)(same). Because the only evidence ever associated with the charge in Count III was three kilograms of cocaine, and that evidence was never contested, no rational jury could have found Wayne guilty of possession of cocaine with intent to distribute it, as charged in Count III, yet at the same time have found that the amount of cocaine involved was less than the 500 gram threshold for a forty-year sentence. See Anderson, 236 F.3d at 430. Thus, the Apprendi error in failure to submit drug quantity to the jury on Count III-if, indeed, Wayne's case was retroactively subject to Apprendi—was thus harmless beyond a reasonable doubt.

Turning to Count V, on which Wayne was sentenced to 300 months, the trial transcript again provides copious and unchallenged evidence that Wayne was involved in a conspiracy to distribute multiple kilograms of cocaine—that is, beyond a reasonable doubt, the conspiracy involved cocaine in excess of the 500 grams required for a sentencing enhancement of up to forty years pursuant to 21 U.S.C. 841(b)(1)(B)(ii)(Ii). See 21 U.S.C. * 846 ("Any person who. . . conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the. . . conspiracy."). Specifically, the trial transcript contained unchallenged evidence of several transactions involving in excess of 500 grams of cocaine, which is the threshold for a sentence of up to forty years pursuant to 21 U.S.C. § 841(b)(1)(B)(ii)(II). See Trial Transcript, Vol. II, 237-38 (two-kilogram transaction in 1987), 240-43 (three-kilogram transaction in 1987), 252 (5- and 10-kilogram transactions in 1980), 255-56 (5-kilogram transactions in 1985 and 1987); id., Vol. IV, 742-44 (two-kilogram transaction in 1986). 747-50 (a two and three kilogram transaction in the spring of 1981). One of those transactions was the substantive offense charged in Count III on which the jury also found Wayne guilty. See Trial Transcript, Vol. IV at 753-57. The failure to

submit drug quantity to the jury on the conspiracy charge in Count V was therefore also "harmless beyond a reasonable doubt," "[b]ecause no rational jury could have found [Wayne] guilty of the substantive offense [of distribution of cocaine], yet at the same time [have] found that the amount of [cocaine] the conspiracy [involved] was less than (the threshold for enhanced sentencing]." Id. at 430 (citing Nealy, 232 F.3d at 830).

Wayne contends, however, that his trial counsel had no incentive to contest drug quantity at trial, when drug quantity was treated as a sentencing factor for the court's determination under controlling precedent at the time. He contends further that his trial counsel did strenuously contest the inconsistencies in the drug quantity evidence at sentencing. See Wayne's Supplemental Brief at 12 & n. 13. To the extent Wayne's citations to the transcript of the sentencing hearing even involve arguments by his trial counsel, rather than comments by the court or arguments of the prosecutor, or even relate to drug quantity at all, the court finds that the cited portions of the transcript involve Wayne's trial counsel's challenges to "counting" of certain quantities involved in the conspiracy as attributable to Wayne, challenges to the definiteness of evidence of particular quantities, or challenges to the definiteness of the evidence that certain transactions actually took place all in the context of determining Wayne's offense level under the Sentencing Guidelines. However, nowhere is there a challenge to drug quantity at sentencing amounting to an argument that the conspiracy involved less than 500 grams of cocaine.

Thus, as to both Counts on which Wayne was sentenced, the court finds that there was "over-whelming evidence' that Wayne committed offenses involving quantities of cocaine in excess of 500 grams, "such that [Wayne's] sentence.; do not exceed the statutory maximum as proscribed by Apprendi." Anderson, 236 F.3d at 429. Therefore, any Apprendi violation was harmless beyond a reasonable doubt. Id. at 430.

III. CONCLUSION

Neither party has made objections sufficient to invoke de novo review of Judge Zoss's recommendations for the disposition of the first four of Wayne's claims in his amended motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence on two drug-trafficking offenses. Having reviewed the record and Judge Zoss's findings of fact and conclusions of law as they relate to Wayne's first four claims, I find no error and accept the Report and Recommendation as to these claims. Therefore, pursuant to Judge Zoss's recommendation, that part of Wayne's motion asserting his first four claims is denied. Moreover, as to these claims Wayne has failed to make a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c); see also Garrett v. United States, 211 F.3d 1075, 1076-77 (8th Cir. 2000); Mills v. Norris, 187 F.3d 881, 882 n.1 (8th Cir. 1999); Carter v. Hopkins, 151 F.3d 872, 873-74(8th Cir. 1998); Ramsey v. Bowersox, 149 F.3d 749 (8th Cir. 1998); Cox v. Norris, 133 F.3d 565, 569 (8th Cir. 1997), cert. denied, 525 U.S. 834 (1998). A certificate of appealability as to these claims is therefore denied.

However, the court rejects Judge Zoss's recommendation as to Wayne's fifth claim in his § 2255 motion, as amended, his assertion of an "Apprendi violation." Instead, upon de novo review, and assuming that Apprendi is retroactively applicable to cases on collateral review, the court concludes that any Apprendi error in Wayne's case was harmless beyond a reasonable doubt. Therefore, that portion of Wayne's § 2255 motion, as amended, asserting an Apprendi violation is also denied. Although a certificate of appealability was otherwise denied above, the court finds that the requirements of 28 U.S.C. § 2253(c) for a certificate of appealability of the disposition of the portion of Wayne's § 2255 motion asserting an Apprendi violation have been satisfied. Therefore, a certificate of appealability as to this claim is granted.

IT IS SO ORDERED

DATED this 30th day of April, 2001.

MARX W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

Footnotes

[1]In a footnote, the court in Anderson observed, "The parties disagree as to the appropriate standard of review. Because we conclude that the Apprendi error does not warrant reversal under harmless-error analysis, we need not decide whether the more stringent plain-error standard of review would apply to this case." Anderson, 236 F.3d at 429 n.3. Although *harmless error" and "plain error" both consider the effect of the error upon the verdict, in light of what a jury would have found based on the evidence, the government bears the burden of proving "harmless error," while the defendant or petitioner has the burden of proving "plain error." See, e.g.. United States v. Strickland, __ F.3d __, __, 2001 WL. 320887, *6 (4th Cir. April 3, 2001); see also United States v. Candelario, 240 F.3d 1300, 1307-08 (11th Cir. 2001) ("harmless error" review applies to preserved errors, and "plain error review applies to errors to which no objection was made at trial). As in Anderson, this difference is immaterial here, because this court concludes that even affording Wayne the more generous standard of review, and thus allocating the burden of proof to the government the Apprendi error was "harmless" beyond a reasonable doubt.

[2]Several other Circuit Courts of Appeals considering direct appeals involving Apprendi claims based on lack of jury determination of drug quantity have also applied a "harmless error" or plain error" standard of review. See. e.g.. United Stases v. Strickland, __ F.3d __, __ 2001 WL. 320887. *'7 (4th Cir. April 3, 2001) (on direct appeal, the defendants could not meet their burden to show plain error, because, "as we easily conclude, beyond a reasonable doubt, . . . the jury verdict

would have been the same had the jury been asked specifically to find whether the conspiracy in this case involved more than 5 kilograms of cocaine or 50 grams of crack cocaine"); United Slates v. Candelario, 240 F.3d 1300, 1312 (11th Cir, 2001) (concluding, on direct appeal, that, based on the evidence, "no reasonable jury could have concluded that Candelario was guilty of the substantive offense (possession with intent to distribute cocaine base), but that the amount was less than five grams," thus, the Apprendi error did not affect substantial rights); United States v. Terry, 240 F.3d 65, 74 (1st Cir. 2001) (concluding, on direct appeal, that the defendant could not establish that there were any "prospects. . . that the submission of the question—whether the trigger drug quantity amount was met—to the jury would have resulted in a different outcome, keeping in mind the higher standard of proof required before a jury," because, given the evidence, and the defendant's defense of entrapment, which did not challenge the quantity evidence, it was impossible to prejudice); United States v. Minus. 237 F.3d 866, 875 (7th Cir. 2001) (on direct appeal, on review for plain error, where the defendant did not preserve the error, the error in failing to submit drug quantity to the jury did not affect the integrity of the verdict, because, in light of the evidence, "had the jury been properly charged, it certainly would have found that Mietus possessed more than 50 kilograms of marijuana," and even if the defendant had properly preserved the argument. "We would find that any error here was harmless"); United States v. Jackson. 236 F.3d 886, 837-88 (7th Cir. 2001) (per curiam) (the defendant could not establish "plain error" in failure to submit drug quantity to the jury, because the evidence of drug quantity was so "overwhelming" that "failure to ask the jury to determine whether the amount was at least 5 grains [of crack cocaine] was harmless far beyond a reasonable doubt"); United States v. Nance 236 F.3d 820, 825-26 (7th Cir. 2000) (concluding, on direct appeal, that there was no "plain error" in failing to submit drug quantity to the jury, because "[i]f this jury was going to convict [the defendant] at all—which it plainly did—there is simply no way on this record that it could have failed to find that he was conspiring to distribute 5 grams or more

of crack cocaine"); United States v. Keeling, 235 F.3d 533, 539 (10th Cir. 2000) (the defendant could not establish plain error, where drug quantity was not submitted to the jury, because evidence of the defendant's involvement in the marijuana growing operation was overwhelming); United States v, Nealy 232 F.3d 825, 829-30 (11th Cir. 2000) (error in failing to require jury determination of drug quantity was harmless, because the defendant did not contest the quantity of drugs at trial, and in light of undisputed evidence of drug quantity, "no reasonable jury could have rationally concluded that Defendant was guilty of the substantive offense—possession, with intent to distribute the cocaine base in his backpack—but that the amount of cocaine possessed was less than 5 grams"); United States v. Swatzie, 228 F.3d 1278, 1284 (11th Cir. 2000) (where evidence of drug quantity was "overwhelming," there was no plain error, because "a jury could not in this state of evidence have concluded that [the defendant] possessed a controlled substance with intent to distribute, but did not possess at least 5 gm of cocaine base," nor did the defendant suffer from lack of notice of the kind and quantity of drugs at issue).

Moreover, several federal district courts entertaining motions for collateral review based an Apprendi errors involving failure to submit drug quantity to the jury have also applied the "harmless" error" standard embraced in Anderson, or a similar "plain error" standard, which also turns on whether a rational jury could have reached a different conclusion on drug quantity. See, e.g., Surratt v. (United States, — F. Supp. 2d 2001 WL 391858, '2 (D. Minn. March 30, 2001) (on a motion to amend sentence pursuant to 28 U.S.C § 2255, the court, in reliance on Anderson, 236 F.3d at 429, concluded that the Apprendi error in not submitting drug quantity to the jury was harmless, finding that "[b]ecause of the undisputed evidence of drug quantity at trial with regard to Counts 1-3, no reasonable jury could have rationally concluded that Petitioner was guilty of the drug offenses and at the same time found the amount of drugs was less than the amounts listed in the indictment."); Robinson v. United States, 129 F. Supp. 2d 627, 631 (S.D.N.Y, 2001) (on a § 2255 motion, the

defendant could not show a "substantial and injurious effect or influence in determining the jury's verdict,'" as to drug quantity, as required to satisfy "harmless error" review under Neder v. United States, U.S. 119 S. Ct. 1827, 1333-34 (1999), because, even in light of evidence that another person testified that the drugs were his, "[t]here was no challenge to the drug quantity, either at trial or at sentencing [so that] [m]ovant effectively conceded the amount"); Levan v. United States, 128 F. Supp. 2d 270, 278-79 (E.D. Pa. 2001) (reasoning that, although decisions applying harmless error review to Apprendi issues on direct appeal were not controlling in this case pursuant to § 2255, they were instructive, and concluding that, where drug quantity evidence was presented to the jury at trial without dispute, there was no reason to believe that the jury would have found a different quantity than the court did, much less a quantity beneath the sentencing enhancement threshold); United States v. Gibbs, 125 F. Supp. 2d 700, 706 (E.D. Pa. 2000) (same).

[3] Indeed, the allegation in Count V was sufficient to give notice of an enhanced maximum penalty of life imprisonment, pursuant to 28 U.S.C. § 841(b)(1)(A)(ii)(II), which authorizes a maximum penalty of life imprisonment for drug-trafficking offenses involving "5 kilograms or more of a mixture or substance containing a detectable amount of. . . cocaine."